IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 477

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

—v.—

BROTHERHOOD OF LOCOMOTIVE ENGINEERS; LOCAL LODGE DIVISION 823 OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS; J. E. EASON, individually and as an official of said Brotherhood; J. D. SIMS, individually and as an official of said Brotherhood; H. M. SAWYER, individually and as a member of said Brotherhood; W. K. MORRIS, individually and as a member of said Brotherhood; and G. W. RUTLAND, individually and as a member of said Brotherhood,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. THE DISTRICT COURT'S INJUNCTION HERE VIOLATED SECTION 2283 OF THE JUDICIAL CODE

While most of the arguments set forth in the respondents' brief have been anticipated in our opening brief, some discussion of certain points raised therein may be merited. Before doing so, we must recall, for the sake of clarity, that on the question whether the injunction passed here by

the Federal District Court against the state court proceedings was permissible under Section 2283 of the Judicial Code, the respondents have a twofold burden. First, they must demonstrate that the case is one of a sort which comes within the statutory exceptions to Section 2283. Secondly, if they should demonstrate that, they must show the propriety of the injunction under that exception, that is, that as a matter of substantive law the District Court was correct in enjoining the state court proceedings. The latter point in turn depends on the correctness of the District Court's conclusion that under this Court's *Jacksonville Terminal* decision the Florida Circuit Court could not apply Florida law with respect to the secondary picketing involved here. Of course, as we have just noted, the second question is only reached once it is determined that this sort of Federal preemption defense may be litigated in an injunction proceeding against an action in the state courts, rather than through the established procedure of exhaustion of state appellate remedies and review by this court. See our Opening Brief, pp. 24-32.

A. *None of the Statutory Exceptions to Section 2283's Ban on Federal Court Injunctions against State Court Proceedings Is Present Here*

1. While the respondents never precisely identify which exception from Section 2283 they are relying on and while they occasionally misquote the statutory language (see point 3, below), the exceptions apparently relied upon, perhaps jointly and severally, are those which permit injunctions against state court proceedings where "necessary in aid of its [the District Court's] jurisdiction" or "necessary . . . to protect or effectuate its [the District Court's] judgments." (Res. Br., p. 2) Most of the respondents' argument apparently turns on the contention that

the injunction here was necessary to protect orders entered by the Federal District Court. While in the lower courts, and in opposing certiorari, the respondents relied only upon the April 26, 1967 order of the District Court in the present case denying the ACL temporary injunctive relief against the picketing (A. 64-68), the respondents now mention for the first time a number of other federal court proceedings, the orders in which apparently require protection through the injunction against state court proceedings challenged here. These newly-cited proceedings are listed on page 22 of the Respondents' Brief.

While it may be conceded that all these newly-cited federal court proceedings involve the lengthy labor dispute on the FEC, the respondents identify no order ever entered in any of them which in any way requires protection against state court action by the injunction under review here. For example, the principal, and repeatedly cited new case is *United States* v. *Florida E. C. R. Co.*, M.D. Fla., No. 64-107-Civ-J, which at one point reached this Court under the name of *Brotherhood of Railway & S.S. Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966). See Res. Br. 4-5, 22, 28-30. In that case, the District Court, in proceedings to which the United States, the FEC and the rail unions are parties but the neutral carriers are not, is passing on the question whether certain alterations in the terms and conditions of employment on its line unilaterally imposed by the FEC are "reasonably necessary" in order to permit it to continue operations despite the strike.[1] See also

[1] The proceeding mentioned in the text is the matter which is denoted as cases (a) and (b) on page 22 of Respondents' Brief. The case denoted (c) amounts to an injunction order which was entered over seven years ago. *Florida East Coast R. Co.* v. *Jacksonville Terminal Co., et al.*, U.S.D.C., M.D. Fla., No. 63-16-Civ.J. That order requires the neutral carriers to maintain interchange with the FEC. It is hard to say how the state court injunction

Mungin v. *Florida E. C. R. Co.*, 416 F.2d 1169 (5th Cir. 1969).

What this proceeding has to do with the question whether state law can be applied with respect to the BLE's attempt to picket the Moncrief Yard—wholly-owned by the Seaboard Coast Line—in order to put pressure on the FEC, is left in a convenient state of obscurity by the respondents. The contention is apparently made that by reason of having *United States* v. *Florida E. C. R. Co.*, No. 64-107-Civ-J, *supra*, before it, Judges Scott and MacRae of the United States District Court for the Middle District of Florida have acquired considerable expertise in performing "railroad duties." Res. Br., pp. 5, 30. While it may be conceded that that court has acquired a great experience in railway labor law by reason of the pendency of that case, we had not previously heard it suggested that expertise creates an implied exception to the anti-injunction provisions of Section 2283 of the Judicial Code. Certainly Section 2283 does not permit the injunctive ouster of state courts from exercising jurisdiction simply on the assertion of greater competence on the part of the federal judiciary. As set forth in note 1, above, the other newly-cited proceedings likewise did not involve any order of which the injunction under review could be said to be a vindication.

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interfered with that order; indeed, the two orders appear complementary. (Respondents complain, Res. Br., p. 7, n. 6, that they were not permitted to intervene in the proceedings just referred to. The fact that they delayed over two years before attempting to intervene was the reason for the courts' denial of intervention.)

The proceeding identified as (d), whose proper style is *Brotherhood of Locomotive Engineers et al.* v. *Florida East Coast R. Co. et al.*, U.S.D.C., M.D. Fla., No. 65-352-Civ.J., is a proceeding in which there has not been any active step taken by the parties since April, 1966. While the neutral carriers are parties defendant in the cases denoted as (c) and (d), they are not even parties in the so-called *"Clerks"* case discussed in the text.

Respondents never point to any specific order entered in any of these federal court proceedings, except the April 26, 1967, order in No. 67-335-Civ-J, the case at bar, which it is claimed that the injunction under review was designed to protect or effectuate. This was the only order relied upon by the District Court itself. We suggest that the late discovery of these additional proceedings as a justification for the District Court's injunction is no more than a red herring.

2. The respondents assert that the District Court's April 26, 1967, order amounted to a declaration of rights of the ACL—the neutral carrier—and the unions with respect to the secondary picketing at Moncrief Yard. The respondents do not appear to contend that the simple fact that the District Court denied the injunction which was sought under federal law against the picketing makes it offensive to the District Court's order that the state court later enjoined that picketing under state law. This is, of course, underscored by the respondents' own procedural conduct; it was not until after this Court's decision in the *Jacksonville Terminal* case, two years later, that steps were taken in the federal court to enjoin the state court's injunctive order. —This makes it clear that the basis on which the federal court injunction against the state court proceedings was sought was not that the state court injunction was somehow inconsistent with the federal court's denial of that injunction, but was in reality an attempt to adjudicate a preemption defense to the state court proceedings by way of an injunction against them.

We have developed in our Opening Brief (pp. 38-39) the fact that the clear basis for the District Court's April 26, 1967, order was the Norris-LaGuardia Act. The District

Judge in question was, after all, the same federal district judge who in 1966 had enjoined the picketing at the Jacksonville Terminal, only to have his action reversed by the Court of Appeals by reason of the Norris-LaGuardia Act. See *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F.2d 649 (5th Cir. 1966), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). During the course of the oral argument before the District Judge which led to the denial of the temporary injunction evidenced by the April 26, 1967 order, the following colloquy occurred:

> "The Court: You are basing your case solely on the Norris-LaGuardia Act?
>
> "Mr. Milledge [attorney for the BLE]: Right. I think at this point of the argument, since Norris-LaGuardia is clearly in point here." (A. 63)

The key conclusion of law of the April 26, 1967, order is Conclusion No. 6 (A. 67), which is simply an adaptation to the facts of the Moncrief Yard picketing of the "economic self-interest" rationale used by the Court of Appeals for the Fifth Circuit in the *Trainmen* case just mentioned in holding the Norris-LaGuardia Act applicable. See 362 F.2d, at 654-55. The subsidiary conclusions with respect to the FEC's and the brotherhood's rights of self-help as between themselves are simply part of the reasoning why the Norris-LaGuardia Act was held to be applicable. (See Pet. Br., pp. 38-39) And the single reference to Section 20 of the Clayton Act, as we have set forth in our Opening Brief, does not indicate whether the District Court was relying upon the paragraph of that Section which simply contains an anti-injunction provision or the paragraph which states that certain acts may not "be considered or held to be vio-

lations of any law of the United States." See Pet. Br., p. 39, n. 9. —In any event, nothing in that order purported to define the rights of the parties to relief under state law; in the final analysis, unless the order had done that, it is not possible to justify the subsequent injunction against state court proceedings as "necessary . . . to protect or effectuate" that order.

Moreover, that order could not amount to a declaration of the parties' rights under federal law, let alone state law, because it was an order made simply upon application for a preliminary or temporary injunction. See the authorities cited at page 40 of our Opening Brief.—Presumably on this point, the respondents cite at length the cases of *Looney* v. *Eastern Texas R. Co.*, 247 U.S. 214 (1918), and *Sperry Rand Corp.* v. *Rothlein*, 288 F.2d 245 (2d Cir. 1961). See Res. Br., pp. 38-40, 51-52. In both these cases, a federal district court had granted affirmative relief through an interlocutory order, in one case by way of injunction and in another case ordering discovery and establishing priorities of discovery. In each case, the losing party in the federal court took action in the state courts which tended to frustrate the relief which had been ordered by the federal court. Under those circumstances, the federal court's subsequent grant of an injunction against prosecution of the state court proceedings was "necessary . . . to protect or effectuate [the District Court's] judgments."[2]

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[2] Thus, the *Looney* and *Sperry Rand* cases do not teach that a preliminary injunction or other interlocutory order is a determination of the merits, protected against relitigation in a state court by injunction notwithstanding Section 2283. What they teach is that an interlocutory order of a federal court is as much entitled to protection by injunction against interference from a state court as is a final order. But here the April 26, 1967, order denying an injunction under federal law was not interfered with by the grant of the state court injunction under state law.

Here, the case is not one of an interlocutory order or injunction interfered with by proceedings in the state courts. Even accepting the respondents' version, all that the April 26, 1967, order presents are various conclusions of law on the basis of which a preliminary injunction was denied. The findings and conclusions made in connection with the temporary injunction do not "determine the rights of the parties." See, *e.g., Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932). Accordingly, there is no federal court determination of the parties' rights which is entitled to protection against a state court redetermination. Of course, this point is simply additional to the point that if the federal court had determined any rights, it determined only rights under federal law, and not those under state law.

3. The respondents also seem to invoke the exception from Section 2283 that permits injunctions against state court proceedings where "necessary in aid of its [the District Court's] jurisdiction." On this point, the basic fallacy of the respondents is exemplified in the casual misparaphrase of the statute with which they commence their Summary of Argument, to the effect that: "This case turns upon the power of a Federal District Court to protect its plenary jurisdiction . . . ." (Res. Br., p. 21) But the statute does not say anything about injunctions "protecting jurisdiction": Its exceptions are for injunctions "to protect or effectuate its [the District Court's] judgments" or "*necessary in aid of* its [the District Court's] *jurisdiction.*" (Emphasis supplied) The distinction is more than a verbal one. The basic point of Section 2283 is that the fact that a federal court may have jurisdiction over a dispute does not authorize it to enjoin a state court from also exercising jurisdiction. In these cases, the bringing of a second action,

this Court has said, "does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230 (1922).[3]

The respondents' position is not aided by their characterization of the jurisdiction of the federal court as "plenary." Whatever this means in more precise terms, the point of Section 2283 is that in the exercise of *its* plenary jurisdiction to pass on matters of federal law, the federal court is not entitled to enjoin the state courts in the exercise of *their* plenary jurisdiction. "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time." *Donovan* v. *City of Dallas*, 377 U.S. 408, 412 (1964).[4] "[W]here the judgment sought is

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[3] The argument made by respondents at Res. Br., p. 52, that Section 2283 is subject to an implicit exemption here to avoid a supposedly "unseemly" race for a final judgment is similarly beside the mark. For the cases construing the predecessors of Section 2283 make it plain that it is only when a final judgment occurs that one court is precluded from proceeding further with the matter, except to recognize the prior judgment of the court first reaching judgment. *Kline* v. *Burke Construction Co., supra,* 260 U.S., at 230-31, and cases cited. Thus, that there will be an occasional race for a final judgment is part of the price paid for having two sets of courts of plenary jurisdiction; the basic approach of Section 2283 is that one court does not interfere with the other until a final judgment has been reached in one court. Moreover, since the federal court here was proceeding under federal law and the state court solely under state law, even a final judgment one way or the other from either court would not be conclusive on the other court as to whether a remedy was or was not available against the picketing under the federal law in federal court or under state law in the state court, as the case might be.

[4] The court continued: "An exception has been made in cases where a court has custody of property, that is, proceedings *in rem*

strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata for the other." *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939). See also *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.*, 195 F.2d 406 (5th Cir. 1952); *Jos. L. Muscarelle, Inc.* v. *Central Iron Mfg. Co.*, 328 F.2d 791 (3d Cir. 1964); *Hayes Industries, Inc.* v. *Caribbean Sales Associates, Inc.*, 387 F.2d 498, 501 (1st Cir. 1968); *Hyde Construction Co.* v. *Koehring Co.*, 388 F.2d 501 (10th Cir. 1968), *cert. denied*, 391 U.S. 905 (1968); *Southern California Petroleum Corp.* v. *Harper*, 273 F.2d 715 (5th Cir. 1960). Indeed, there are cases holding that Section 2283 bars an injunction even to enforce an *exclusive* jurisdiction of the federal court. See *Puget Sound Power & Light Co.* v. *Asia*, 2 F.2d 495, 491 (W.D. Wash. 1921), *aff'd on other grounds*, 277 Fed. 1 (9th Cir. 1922), *cert. denied*, 258 U.S. 619 (1922). Here—where it is clear even under the substantive authority, the *Jacksonville Terminal* case, relied upon by respondents, that the state court has jurisdiction—it would violate the long settled construction of the central purpose of Section 2283 to hold that the exception for injunctions "necessary in aid of jurisdiction" permitted an injunction against the prosecution of a suit in state court simply because it involved the same controversy as a suit in federal court.

Thus, even if the proceedings in the state court and the federal court had to do with a claim arising under the same substantive law, state or federal, there would have been no basis for the federal court here to have enjoined the state court proceedings. See *Southern R. Co.* v. *Painter*,

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or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed." 377 U.S., at 412.

314 U.S. 155 (1941). The matter becomes even clearer when it is remembered that the state suit was pleaded solely under state law. This fact makes it more apparent that all the respondents are seeking to reach is the forbidden result of adjudicating a preemption defense to a state court proceeding by way of an injunction suit in a federal court.[5]

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[5] The respondents frequently quarrel with the fact that their three attempts to remove the state court proceeding to federal court were greeted by remand orders entered by the Federal District Court; interestingly enough, by the same district judge who finally enjoined the state court proceedings. See Res. Br., pp. 17-19, p. 42, n. 14. It is claimed that these three remands were erroneous under *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968). *Avco* was a suit for specific enforcement of a no-strike clause in a collective bargaining agreement, under Section 301 of the Labor Management Relations Act. This Court had previously held that such clauses might not be enforced by injunction in federal court by reason of the Norris-LaGuardia Act, see *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962). This Court held in *Avco* that notwithstanding the Norris-LaGuardia Act's bar against an injunction under these circumstances, the case was one within the District Court's original jurisdiction and hence properly removable.

Here, the only relief sought in the state court was under state law. If state law could be applied here, the case was not removable. If it could not be applied, it would appear that the remedy of the defendant was dismissal of the action, not removal to federal court. In any event, the whole contention as to the applicability of *Avco* by respondents underscores their basic strategy to have the question of the federal preemption defense litigated through a proceeding in the federal court.

In an extraordinary contention, after several times reciting that the orders of remand entered by the District Court were not "directly" reviewable, Res. Br., pp. 17, 18, 19, 42, the respondents urge this Court at this time to pass upon the correctness of the order of remand "in the interests of sound judicial administration." Res. Br., p. 42, n. 14. The suggestion calls for a little more than the exercise of "sound judicial administration." The Judicial Code does not simply provide that orders of remand are "not directly reviewable" as respondents repeatedly assert; what the Code says is that orders of remand are "not reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). Where exceptions have been made, they have been made statutorily. See *Georgia* v. *Rachel,* 384 U.S. 780 (1966) (civil rights cases).

4. What the respondents are really trying to do, with a thin procedural veneer, is to suggest that there is an additional exception to Section 2283 where a party desires to try out a federal preemption defense to state law proceedings through an injunction application in federal court. As we pointed out in our Opening Brief, pp. 28-29, the suggestion that there is an additional exception to Section 2283 where the state court is said to be "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress," was flatly rejected in the *Richman Brothers* case, *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511, 515 (1955). The respondents essay various distinctions to the *Richman Brothers* decision; the only ones not anticipated in our opening brief are the rather remarkable contentions beginning on page 48 of the respondent's brief. There it is suggested that an exception may be made from Section 2283 in this case, although not made in *Richman Brothers*, because while in the Labor Management Relations Act context of *Richman Brothers*, the state courts were totally without jurisdiction, in the present context it is admitted that they have jurisdiction but simply are said not to be entitled to apply state law.—To this argument we can only comment that if any distinction were drawn, we would think it would run the other way; that an implied exception to Section 2283 might be advisable—although this Court has rejected it—where the state court is without jurisdiction, although not where it admittedly has jurisdiction, but simply is said not to be entitled to apply state law.[6] We submit that the

[6] It is also suggested (Res. Br., p. 49) that this Court denied the injunction in *Richman Brothers* because there was a "penumbral region" in which the state court might have functioned, whereas there is alleged to be none here. The fact of the matter is, however, that this Court's opinion in *Richman Brothers* began with the acknowledgment by the author of the majority opinion

other courts of appeals, and the Fifth Circuit prior to this case, have been correct in uniformly following the teaching of this Court that Section 2283 prohibits enforcement of a federal labor law preemption defense, however meritorious, by injunction against state court proceedings. See the cases cited in Pet. Br., p. 30, n. 7.

Thus, all that the injunction here seeks to accomplish is the forbidden role of adjudicating a federal preemption defense through an injunction against state court proceedings. While as respondents point out this case is one of a number which have been produced by the extensive labor difficulties on the FEC, and while that dispute has been extensively litigated in the federal courts, it must be remembered that Section 2283 is not simply an expression of general congressional intent subject to modification in cases claimed to be deserving. As the Court put it in *Richman Brothers*:

> "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." 348 U.S., at 515-16.

The proper course for respondents to have followed would have been to pursue their appellate remedies in the Florida courts. Eight months have now passed since the Florida Circuit Court indicated that it would, upon respondents' request, enter a final judgment which would remove any question as to appealability (Pet. Br., pp. 15, 32), but respondents have not yet lifted a finger to do so. One cannot assume that if the preemption defense were

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that on the merits the state court's action was clearly preempted by the Labor Management Relations Act. 348 U.S., at 512, 514.

meritorious, the Florida appellate courts would not correct the Circuit Court. Only the other day the Florida Supreme Court reversed, and indeed chastised a lower Florida court for insufficient adherence to the preemption doctrine prevailing under the Labor Management Relations Act, pointedly ordering the lower "Florida courts [to] refrain from tweaking the federal nose by precipitously issuing injunctions. . . ." Local 223, *Sheetmetal Workers Int'l Ass'n* v. *Florida Heat & Power Co.*, 73 LRRM 2239, 2242, January 7, 1970.

B. *Even If Section 2283 Permitted the District Court Here to Pass on the Preemption Defense of the BLE to the State Court Proceedings, That Defense Is Not Valid*

To be sure, even if either generally or because of some peculiar circumstance existing here the validity of the preemption defense asserted by the BLE to the state court proceedings could be tried out through its application for an injunction in Federal Court, in order to sustain that injunction the respondents would have to demonstrate the validity of that preemption defense. Their reliance is on *Brotherhood of Railway Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), which we extensively discussed and distinguished in our Opening Brief, pp. 42-52.

As they did below, the respondents seize upon certain general language at the close of the Court's opinion in the *Jacksonville Terminal* case (Res. Br., pp. 33-34), ignoring the various unique factors involved at the jointly-owned Jacksonville Terminal, such as the unusual joint venture agreement, the provision of numerous services by the Terminal Company to the FEC, the fact that numerous FEC employees reported to work on the premises, the mixed use in fact of the purportedly separate entrances

for employees of the different carriers, and numerous other factors not present here, which we must assume were incident to the Court's holding in that case. See 394 U.S., at 372-74; 389-90, Pet. Br., pp. 44-45. We assume that if these had no relevance, they would not have been discussed at length. Moreover, the extensive legal and factual analysis of the sort of picketing having secondary implications that is protected or prohibited, which was rendered in the circumstances of the facts presented in the case then at bar (394 U.S., at 387-90), would appear meaningless if a conclusion was being reached that state law was totally ousted with respect to all exercises of so-called "self-help" upon neutral third parties to a railway labor dispute, absent violence.

The respondents' position is that the *Jacksonville Terminal* case teaches that state laws are completely inapplicable regardless of how "secondary" the self-help conduct in question is, and how far removed the neutral carriers are from the dispute. Under respondents' reading of the *Jacksonville Terminal* case, the "hot car" treatment could be given to FEC-originated cars wherever they happen to move throughout the United States, in order to induce the connecting carriers to stop receiving cars from the FEC. In arguing before the state court, after the decision in the *Jacksonville Terminal* case, for the dissolution of the state court injunction, counsel for the respondents made no effort whatsoever to identify the picketing in the Moncrief Yard situation factually with that which went on in the *Jacksonville Terminal* case. Instead, the position was flatly and exclusively taken that all picketing, however unqualifiedly secondary, was free from injunction under *Jacksonville Terminal*, and that it was no longer a matter of "how far you can go or how far you can't go." Luckie 1969 Tr.,

p. 19. The argument was that there was no longer any question of "any rules or distinctions of what is primary or secondary" nor "any corpus or body of law, which is available to any employer who does business with the FEC to prevent the picketing to stop them from doing business with FEC." Luckie 1969 Tr., pp. 23-24; see generally, *id.*, pp. 2-29. The result of such a reading would be to turn national labor policy on its head and permit a more wide-spread escalation of labor disputes under the Railway Labor Act than under the Taft-Hartley Act despite the fact that the former statute generally is much more concerned with limiting the parties' economic weapons and confining the area of controversy in the light of the basic importance of the industry it deals with.

Understandably uncomfortable with the breadth of the proposition which it espouses, the BLE repeatedly seeks to understate the facts as to the picketing here, in an effort to make that picketing sound as much like the picketing in the *Jacksonville Terminal* case as possible. Thus, the BLE contends that it was not the "avowed purpose" of the picketing to close down the Moncrief Yard. But Sims, the BLE official in charge of the picketing, told the ACL's superintendent that "he was going to shut down the Coast Line Railroad and I could tell my [the ACL's superintendent's] management about it." (A. 31).

The respondents' presentation is rather vague as just what it was that the picketing was supposed to accomplish.[1]

[1] There is also a rather extensive and perhaps confusing barrage of statistics presented by respondents in an effort to magnify the amount of FEC interchange going on inside the Moncrief Yard. (Res. Br., pp. 9-10) The record is undisputed, however, that approximately 80,000 cars are handled in and out of the Yard each month, of which only 12,000 are destined for, or originated on, the FEC. Thus the interchange traffic amounts to only 15% of the cars handled in the Yard. Luckie Tr., pp. 67-70.

"Hot-car" conduct which evidently is now regrettable in terms of litigation strategy is attributed to "over-zealousness or misunderstanding on the part of individual . . . employees." Res. Br., p. 13. The respondents seek to give the impression that the central plan of the picketing was to stop interchanges with the FEC while creating no other effect on the ACL's operations.

The message of the picket signs was: "Do not handle FEC freight." (A. 92) There was nothing said in the signs that FEC freight might be handled where it was part of a string of cars with non-FEC freight. The action of the employees in not handling cars originated on or destined for the FEC wherever found seems an appropriate response to the sign, and hardly the consequence of over-zealousness or misunderstanding. There was ample evidence in the record that the refusals to handle cars which had originated on or were destined for the FEC were not restricted to those portions of the Yard where FEC interchange was effected, and that the employees did not follow any practice of classifying FEC freight except at the time when it was in a "solid block" ready for interchange or fresh from being interchanged. (A. 31, 34, 41, 43, 96, 97) The record is plain that the employees, once the picketing had begun, on numerous occasions declined to handle FEC-originated or destined cars at times *other* than when they were part of so-called "solid blocks." (A. 26-27, 29-30, 49-50, 94-99, 118-130) In some cases, on encountering FEC cars, employees simply walked off the job; this apparently gave recognition to the fact that there simply was no way of their performing their jobs at all on the "solid block" theory now advanced by respondents. (Luckie Tr., p. 72) Whatever the theory of the picketing in retrospect, in practice it amounted to "hot car" picketing.

We detail and provide extensive record references for the blockage of operations in the Yard which followed upon the commencement of the picketing. (Pet. Br., p. 11) It was also clear that by the time of the so-called "truce" the petitioner had depleted its normal working force, and that it would have been impossible to continue to try to run the Yard with supervisory help. (A. 98, 130) There had been a gradually increasing paralysis of the Yard's operations which was averted only by the "truce." Luckie Tr., p. 97.

The respondents admit that the picketing here does not meet the tests usually applied in the cases under the Labor Management Relations Act to determine permissible primary picketing of premises belonging to a neutral employer, namely; they admit that the picketing was neither restricted to the place where the interchange was effected nor to the times when the struck employees were on the premises. Res. Br., p. 32. The startling explanation for this is that this failure is excused if the neutral employer does not consent to a rearrangement of his business, including permitting the pickets to come onto his premises, in order to facilitate the picketing. Res. Br., pp. 11, 32. No authority whatsoever is cited for the extraordinary contention that a neutral employer must organize his business so as to facilitate picketing on a selective basis or face the consequences of unselective picketing. The parties who make this extraordinary suggestion do not seem even aware of the possibility that there might be problems, not the least of which would be physical safety, in permitting a group of pickets to come on foot into the midst of a busy railroad classification yard containing a great number of tracks in close proximity, to picket in an attempt to stop supposedly selected rail movements.

For the reasons stated in our Opening Brief (pp. 44-52), we submit that an intelligible line can be drawn, and indeed appears to be contemplated by the *Jacksonville Terminal* decision, between a holding that there can be no state court regulation of self-help weapons against the primary party to a railway labor dispute or at a joint terminal jointly owned by the struck party, but that the states are free to apply their general law of secondary picketing and boycotts against attempts to picket facilities wholly-owned by neutral carriers.[2]

Finally, if such a distinction does not commend itself to the court, we have suggested that the *Jacksonville Terminal* decision be reconsidered. The primary argument made by respondents in their brief as to why reconsideration would be inappropriate is the fact that to reconsider the decision would somehow be to "reward" the Florida Circuit Judge.[3] (Res. Br., pp. 57-58) The suggestion is, ap-

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[2] In seeking to explain why it is that they are picketing the Moncrief Yard, wholly-owned by one of the neutral carriers, rather than the jointly-owned Terminal facilities, respondents apparently are suggesting that if only the terminal was picketed, all interchange between the SCL and FEC would be moved and would be effected inside Moncrief Yard. But the fact of the matter is that all movements would have to cross the Terminal Company premises in any event, and be switched inside the terminal. See A. 33, 39, 124-25. Thus, the necessity for the escalation of the picketing against a yard wholly-owned by a non-struck carrier has hardly been shown, even if it were thought that necessity is a satisfactory enough reason for such an action. The respondents thus appear to have a self-help weapon available by a resumption of the picketing at Jacksonville Terminal. If for some reason intrinsic to their own strategic considerations, such as the number of paychecks that would be lost by closing down the operations of the entire terminal rather than those of a single neutral carrier, they do not desire to use that weapon, it hardly should be any concern to the courts.

[3] We cannot leave unanswered the extensive assertions in the Respondents' Brief (pp. 20, 35, 48) that the Florida Circuit Judge showed "recalcitrance" or, indeed, plain contempt for this Court. the colloquy quoted at page 35 of Respondents' Brief consists of

parently, that reconsideration is less appropriate where it would have the effect of affirming a lower court's decision (here, by reversing the injunction against it), than where it would reverse the lower court's judgment. We know of no rational basis for such a distinction, and indeed, we would observe that in one of this Court's most celebrated reconsiderations of its prior precedents, it affirmed a district court which had anticipated its action. See *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), *affirming* 47 F. Supp. 251 (S.D.W. Va. 1942).[4]

II. THE DISTRICT COURT'S INJUNCTION HERE VIOLATED THE NORRIS-LAGUARDIA ACT

While paying their respects to the untenable proposition that the Norris-LaGuardia Act does not apply at all to

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the trial court's cutting off argument by Mr. Friedmann, counsel for petitioner, after the oral argument had already covered 35 pages of transcript, and when Mr. Friedmann was apparently about to launch on a perhaps speculative discussion of the background factors which might have been behind this Court's decision in *Jacksonville Terminal.* Mr. Friedmann had just started to say: "I believe the history of the Court . . ." when the judge cut him off. It was quite clear that what the judge meant was that he did not want to hear counsel's characterization of the mental processes of the Court, but rather was interested in what the Court's opinion said. A few lines later, when counsel made the point that the respondents' position was that "by inactivity the Congress of the United States has totally excluded the application of state law in the area," the Court questioned: "Isn't that what this said?" (Luckie 1969 Tr., p. 35), apparently referring to the same language at the end of the *Jacksonville Terminal* opinion which the respondents have repeatedly cited. There was then a lengthy discussion of the other points in the opinion which indicate that this Court did not intend to go so far. The words used by the state court judge on their face do not indicate, and were not understood by counsel at the time of their delivery to mean, that the judge had a bad opinion of this Court.

[4] Of course, here the Florida Circuit Court did not anticipate an overruling of *Jacksonville Terminal,* but simply deemed the present case distinguishable upon its facts.

injunctions against management,[1] (Res. Br., p. 59) the respondents appear to rely on somewhat narrower grounds for its alleged inapplicability here. The primary argument appears to be that the Act was not designed to restrict injunctions which interfere with legal proceedings arising out of a labor dispute. But the presence of Section 4(d) in the Norris-LaGuardia Act makes it plain that Federal injunctive interference with the ordinary course of legal proceedings in connection with labor disputes was one of the matters which Congress had in mind when it passed the Act. "The kinds of acts which had given rise to abuse of the power of enjoining are listed in Section 4." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957). While, of course, Section 7 of the Act applies to cases which Section 4 does not reach, Section 7 should be read, as *Lincoln Mills* indicates, in the light of the matters that Congress was concerned with set forth in Section 4.

Thus we submit that the Act was intended to be applicable to Federal injunctions which interfere with the ordinary course of legal proceedings in connection with labor disputes. The respondents seek to suggest that Section 7 is inapplicable here because the findings that must be made under it are "inapposite." (Res. Br., p. 61) The only finding which is so identified is the finding specified in Section 7(e) that "the public officers charged with the duty to

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[1] Respondents suggest, evidently, that the clear references in the statute to acts which could only be committed by management, such as joining an employer organization, do not reflect the real intention of Congress, but these provisions were inserted solely to give the Act a veneer of impartiality. (Res. Br., p. 59, n. 18) We submit that a statute which on its face is neutral, which is designed to "regulate the jurisdiction of courts," not "to regulate the conduct of people engaged in labor disputes" (*Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 372 (1960)) and which was passed with a legislative history containing the plain expressions which we quoted at pages 62-63 of our Opening Brief, clearly is a "two-way street."

protect [the Union's] property are unable or unwilling to furnish adequate protection." Of course, this finding would rarely be apposite in the case of a union seeking redress against management, but a single *"non sequitur"* hardly supports the proposition that the Act is inapplicable to the injunction at issue. This case is not *Lincoln Mills:* the injunction at issue here *is* of the sort at which the Act was aimed; there are no other provisions of the Act indicating a congressional policy in favor of injunctions such as the one at issue (indeed, congressional policy disfavors injunctions by federal courts against state courts); an unduly literal reading of Section 7 is not necessary to bring this injunction within it. *Cf. Lincoln Mills, supra,* 353 U.S., at 458. Furthermore, the findings required by Section 7 in a number of cases "sensibly apply" to the grant of an injunction such as the instant one. *Cf. Local 205, United Electrical Workers* v. *General Electric Co.,* 233 F.2d 85, 92-93 (1st Cir. 1956), *aff'd,* 353 U.S. 547 (1957). We suggest, as seems implicit in Judge Magruder's opinion just cited, that the best approach is to require that those findings which are apposite to the subject matter be made. If inapposite findings need not be made, that is no reason for dispensing with the apposite ones. The respondents never explain why the required finding: "that complainant has no adequate remedy at law," such as, by an orderly appeal of the state court injunction, was not pertinent here. See Section 7(d) of the Act. Moreover, it would appear that Sections 7(b) and (c) also are applicable and should have been complied with. See Pet. Br., pp. 2a-3a.

Besides violating Section 7 of the Act, the injunction also violates the specifics of Section 4(d). The objection which

the respondents make that Section 4(d) speaks only of aiding others in the prosecution of a lawsuit is here met by the fact that the injunction does prohibit collective and concerted action in aid of the ACL's rights in state court. (A. 196). And while for purposes of Section 2283 the law is settled that the injunction here is viewed as equivalent to one against the state court, the form of the injunction here is against the petitioner and those abetting it. Petitioner has been held to be a person interested in the FEC-railway union labor dispute. The injunction is enforceable by citation of contempt against the petitioner. Accordingly, it is completely wide of the mark to contend, as respondents do for Norris-LaGuardia Act purposes, that the injunction is solely against the state court (Res. Br., pp. 62-63) and not against petitioner. The practicalities are that the injunction in fact restrains *both* the state court and petitioner. To the extent that it restrains petitioner, it violates the Norris-LaGuardia Act.

The final argument made by respondents on this point is wide of the mark. That argument is that since respondents are only, they contend, acting under their so-called self-help rights under the Railway Labor Act, they may bring injunctions to remove obstacles to the exercise of those rights, notwithstanding the Norris-LaGuardia Act. In support of this proposition the so-called "accommodation" cases are cited, *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957), and the cases which it followed. But those cases only hold that specific duties and procedural requirements provided in the Railway Labor Act may be enforced by injunction notwithstanding the Norris-LaGuardia Act. The court there recognized an exception to the Norris-LaGuardia Act only where there

were "specific provisions of the Railway Labor Act" or where the purpose of the injunction was "to enforce compliance with the requirements" of that Act. See 353 U.S., at 42; see also *id.*, at 41. The so-called power to exercise "self-help," even if it is broad enough to cover the secondary self-help methods employed here, is just that; acting under the self-help power is not equivalent to a party's enforcing a statutory command against another through the processes of the court. Exceptions to the Norris-LaGuardia Act are supposed to be built of hardier stuff than this.

CONCLUSION

For the reasons stated in our opening brief and herein, the judgment of the Court of Appeals should be reversed, and the case remanded to the District Court with instructions to deny the respondents' motion for an injunction against the proceedings in the Florida Circuit Court.

Respectfully submitted,

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